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MOORE *VS.* LITTELL AND THE JACKSON TITLE.

THE interesting article of Mr. Chaplin in the May number of the REVIEW draws attention to the case of Moore *v.* Littell. The history of the litigation of which that case formed a part will throw some light upon the character of the decision.

In 1832, Samuel Jackson, being owner of the Hayscale farm in what is now the Borough of Brooklyn, desiring to make provision for a cousin, conveyed the farm to John Jackson for and during his natural life, and after his decease to his heirs and assigns forever. John Jackson took possession of the farm and cultivated it, and brought up there a family of eleven children. The village of Brooklyn became a city and grew up to the farm; streets were laid out through the farm which spoiled it for farming purposes, and assessments were laid upon the land which John Jackson was unable to pay. He was advised to convey his life estate to his children, and that if they would then make partition with warranty, each grantee could make good title to the land conveyed to him. This was accordingly done, and mortgages were made by some of the children upon the land conveyed to them in severalty. Notwithstanding these transactions, the general opinion of counsel was unfavorable to the title, and the children found themselves with deeds of land which they could not sell. The mortgages given by some of them were foreclosed and

the lots covered by them sold for a trifle, judgments were recovered against the mortgagors for deficiency upon the sale, and under these judgments sales of their right, title and interest in the land respectively conveyed to them were made. These sales were mostly for one or two dollars a lot. A few of the children had been able to hold on to the property which was intended for their ultimate support, but, unfortunately for them, John Jackson lived to the age of eighty-nine, and most of the children were unable to carry the property during this long life. Two years before his death one of his daughters died, leaving a son, Fanning Baldwin, and finally in 1861 the life tenant died, and the title became manageable.

In 1862 I first became acquainted with this title. My instruction from Professor Washburn at the Harvard Law School was then too recent to admit of a doubt in my mind that a remainder limited to the heirs of a person living was a contingent remainder. The older counsel in the case concurred in this view, and we agreed that a new partition should be had. This was effected substantially on the lines of the original partition. Then Herbert T. Moore, who had acquired title under the foreclosure of a mortgage given by two of the children, brought an action in ejectment against the tenant of one of these children. The case was argued before the General Term of the Supreme Court. A very able opinion was delivered by Judge Lott.[1] The Court held that the remainder was contingent, but it also held that, under the New York Revised Statutes, a contingent remainder was alienable in the same manner as an estate in possession; and that accordingly the ten children of John Jackson who survived their father had conveyed their interest in the remainder by a valid conveyance, but that the conveyance of Fanny Jackson, the mother of Fanning Baldwin, who died before her father, was ineffective, and that consequently this one-eleventh had not been conveyed to Moore. It would have been well for the children of John Jackson if they had acquiesced in this decision. But there were other questions arising under the title which were debatable, and they decided

[1] Reported 40 Barb., 488, and with a note in 3 Am. Law Reg. (N. S.), 144.

to appeal to the Court of Appeals. In the state of the Calendar of the Court at that time, five years were required before an appeal could be heard. Meanwhile it seemed reasonably clear that under the decision of the General Term the remainder, being contingent, was not the subject of sale on execution. Accordingly an action was brought by Parmenus Jackson against Middleton, who held title to a large number of these judgment sales, requiring him to come in and assert his title or be barred. The General Term of the Supreme Court held that the judgment sales were valid only so far as the estate for the life of John Jackson was concerned, and rendered judgment in favor of the plaintiff.[1] Middleton refused to appeal from this judgment, and the Jackson heirs acquired title to all the lots which had been conveyed to Middleton by a sale upon the judgment for cost against him. To this extent, at least, actual justice was done in the case. Meanwhile the appeal in the case of Moore *vs.* Littell was nearly reached in the Court of Appeals. The counsel who represented other purchasers at the judgment sales, determined to prepare an agreed case for submission to that court. Without any notice whatever to the counsel for the Jacksons, this case was submitted at the term prior to that at which Moore *vs.* Littell was to be argued. The decision in this case, House *vs.* Sheridan, appeared at the end of 1868, greatly to the astonishment of the Jackson heirs and their counsel. We succeeded in keeping the case out of the official reports and moved for leave to reargue all the questions involved in House *vs.* Sheridan, on affidavits stating that the submission in it was collusive. The counsel who had brought about this submission of the House case consented to the granting of this motion. But meanwhile Keyes, an unauthorized reporter, had got hold of the decision and printed it without any authority of the Court,[2] as Judge Woodruff states[3]. That eminent lawyer who had been Chief Judge of the Court of Appeals, George F. Comstock, was brought into the case and made a masterly argument, which is very meagerly reported in Moore *vs.* Littell.

[1] Jackson *v.* Middleton, 52 Barb. 1.

[2] 4 Keyes, 569.

[3] Moore *v.* Littell, 41 N. Y. 71.

He convinced some of the Judges who had acquiesced in the decision of Sheridan *vs.* House, but Judge Woodruff adhered to his opinion. Unfortunately for the Jackson heirs, Judge Lott, for the first and only time in his life, changed his mind, although it was he who had written the opinion in the Court below that the remainder was contingent. He concurred with Judge Woodruff in holding the interest of the children a vested remainder. The Chief Judge and Judges Daniels and Grover dissented. Judge Grover presents the argument in favor of the proposition that the remainder was contingent most clearly, and there is no doubt that the weight of the judicial authority was with the dissenting opinion. Indeed, Judge Grover always said that the reason why the People of the State of New York abolished the old Court of Appeals and created the new Court—the decisions of which are reported in the series beginning 43 N. Y.—was that the old Court did not know the difference between a vested and a contingent remainder.

Not daunted by the defeat in Moore *vs.* Littell, and believing that, in a case involving the validity of the judgment sales, the new Court would overrule the decision of their predecessors as to the remainder, the case of House *vs.* Jackson was presented to the new Court in April, 1872. The writer of this article has very good reason to know that the Judges of the new Court of Appeals were of an opinion that if the question had been *res nova*, they would have held the remainder to be contingent.[1]

In short, they agreed with Judge Grover. But as the decision in the pending case was on the same title as that of Moore *vs.* Littell, they felt constrained to follow that decision, and carried it out to its logical conclusion. If the remainder was vested, the life estate would merge in this, when it was conveyed to the owner of the remainder. He thereupon would become seized of a present estate in fee, in which his wife would be entitled to dower, and so it was held in House *vs.* Jackson.[2]

The Court determined the last of the Jackson cases

[1] In Purdy *v.* Hayt, 92 N. Y. 447, 454, a remainder similar to that limited in the Jackson deed, was held to be contingent.

[2] 50 N. Y. 161.

in Jackson *vs.* Littell.[1] There a title derived under the foreclosure of one of the Jackson mortgages came under consideration. The party claiming under it maintained that the mortgagor was estopped to deny the mortgagee's title. But the Court held that if the mortgage contained no covenant of warranty, and the relation of the mortgagor and mortgagee had been extinguished by foreclosure, the mortgagor was not estopped from acquiring and claiming against the mortgagee under a paramount title.

Two ancient proverbs seem to be the moral for the lawyer who studies the history of the Jackson litigation, "Put your best foot forward." "Let well enough alone."

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[1] 56 N. Y. 108.